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Supreme Court, U.S.
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No. 98-1993

In The
SUPREME COURT OF THE UNITED STATES

THE STATE OF FLORIDA,
Petitioner,

v.

J.L.,
Respondent.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENT

John W. Whitehead
Steven H. Aden
Counsel of Record
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, Virginia 22901
(804) 978-3888

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QUESTION PRESENTED FOR REVIEW

1. Whether an anonymous tip which states that a person is carrying a concealed firearm at a specific location with a detailed description of the person and his attire is sufficiently reliable to justify an investigatory detention and frisk where the police immediately verify the accuracy of the tip.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and the European Union. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989) and *Arkansas Educational Television Comm'n. v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over three dozen *amicus curiae* briefs in the United States Supreme Court, including recent criminal justice cases *Wyoming v. Houghton*, 526 U.S. 295 (1999), *Slack v. McDaniel*, 119 S.Ct. 1025 (cert. granted), Sup.Ct. No. 98–6322 (October Term 1998), *Illinois v. Wardlow*, 119 S.Ct. 1573 (cert. granted), Sup. Ct. No. 98-1036 (January 12, 2000), and *Apprendi v. New Jersey*, 120 S.Ct. 525 (cert. granted), Sup. Ct. No. 99-0478 (October Term 1999), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle several hundred cases nationally, including numerous Fourth Amendment cases. The Institute has published educational materials and taught

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[1] *Amicus curiae* The Rutherford Institute files this brief with the consent of counsel for both parties. Letters of consent from the parties' counsel are on file with the Clerk of the Supreme Court. Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, is supporters, or is counsel, made a monetary contribution to the preparation or submission of this brief.

continuing legal education classes in this area as well.

II. SUMMARY OF ARGUMENT

The Petitioner asks the Court to extend the scope of permissible investigatory police "stop and frisk" searches to searches based upon no observations of suspicious activity or credible, verifiable third-party information. *Amicus curiae* The Rutherford Institute respectfully submits that broadening police *Terry* authority in this manner would expand the rationale of *Terry* and its progeny beyond recognition, and threaten to completely obviate the protections from police harassment of citizens afforded by the Fourth Amendment.

III. ARGUMENT

The Court's *amicus* submits that the State of Florida seeks an unreasonable and abusive expansion of the rationale for permitting brief investigatory stops enunciated in *Terry v. Ohio*, 392 U.S. 1 (1968) and subsequent cases. *Terry v. Ohio* reviewed an officer's decision to conduct a "pat-down" search for weapons after observing the subjects engaged in behavior consistent with "casing" a store for a burglary. 392 U.S. at 10-11. The opinion of the Court was carefully and explicitly limited in rationale to a concern entirely apart from the governmental interest in investigating crime: the "immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." 392 U.S. at 23. The Court cautioned:

> [S]uch a search ... is not justified by any need to prevent the disappearance or destruction of evidence of crime. The sole justification of the search in the

> present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

392 U.S. at 29.[2]

Nonetheless, commencing almost immediately after the Court's companion decisions in *Terry v. Ohio* and *Sibron v. New York*, 392 U.S. 40 (1968), the carefully crafted exception to the probable cause requirement enunciated in those cases has been progressively expanded until, as one former Justice warned, the *Terry* exception threatens to "swallow the general rule that Fourth Amendment seizures [and searches] are reasonable only if based on probable cause." *Florida v. Royer*, 460 U.S. 491, 509 (1983) (Brennan, J., concurring) (quoting *Dunaway v. New York*, 442 U.S. 200, 213 (1979)). The expansion began with *Adams v. Williams*, 407 U.S. 143 (1972), which extended the police safety rationale of *Terry* to permit pat-down searches based on reasonable suspicion of possessory offenses, over the vigorous dissents of three of the Justices, one of whom warned that the decision "expand[ed] the concept of warrantless searches far beyond anything heretofore recognized as legitimate." 407 U.S. at 154-55. It continued with an extension of *Terry* stop authority to conduct vehicle searches

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[2] For this reason, the Court reversed the conviction of the defendant in the companion case to *Terry*, *Sibron v. New York*, 392 U.S. 40 (1968), on the grounds that a frisk motivated only by a search for narcotics "was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception -- the protection of the officer by disarming a potentially dangerous man." *Id.* at 65.

for illegal immigrants, *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), then to permit searches based upon reasonable suspicion of past criminal activity alone. *United States v. Hensley*, 469 U.S. 221 (1985). The expansion of *Terry* has culminated in the Court's opinion this session in *Illinois v. Wardlow*, Sup. Ct. No. 98-1036 (January 12, 2000), which held that officers may chase down and detain subjects who flee at the appearance of police in a high-crime area, even absent factors that suggest particular criminal activity is afoot.

The Petitioner now seeks to further broaden the use of investigatory stops to permit peace officers to stop and frisk citizens based only on an anonymous tip that the subject is presently armed, uncorroborated by objective facts indicating reliability. For the reasons set forth below, the Court's *amicus* believes such a further expansion would be patently unreasonable and indefensible.

Amicus urges the members of the Court to bear in mind the invasive and humiliating nature of a "stop and frisk" search. The *Terry* Court restricted the use of the procedure in light of this understanding:

> [I]t is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

392 U.S. at 16-17. The Court went on to measure the nature and quality of the intrusion against police interest in imposing it, noting, "Even a limited search of the outer clothing for

weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." 392 U.S. at 24-25.

For this reason, investigative searches and seizures are to be employed only where necessary, and limited in scope and duration to inquiries and procedures that will dispel or confirm the officer's concerns as expeditiously as possible. "[I]f the person refuses to answer and the police take additional steps ... to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure." *INS v. Delgado*, 466 U.S. 210, 217 (1984). The investigative methods employed pursuant to a *Terry* stop "should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer*, 460 U.S. at 500.

Above all, the facts giving rise to such searches are required to be objective, verifiable and credible. "[The demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry*, 392 U.S. at 21, n. 18. While the Court's recent decision in *Illinois v. Wardlow*, Sup. Ct. No. 98-1036 (January 12, 2000), reemphasized its adherence to the "totality of the circumstances" approach, factors such as the "veracity" of the informant, his "reliability" and the "basis of [the informant's] knowledge" remain "highly relevant in determining the value of [the informant's] report." *Alabama v. White*, 496 U.S. 325, 329 (1990), quoting *Illinois v. Gates*, 462 U.S. 213, 230 (1983).

This Court discussed extensively the specificity requirement in the context of anonymous tips a decade ago in *Alabama v.*

White, *supra*. "[A]n anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity insofar as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and given that the veracity of persons supplying anonymous tips is 'by hypothesis largely unknown, and unknowable.'" 496 U.S. at 329, quoting *Illinois v. Gates*, 462 U.S. at 237. The anonymous tip in *White* would have been insufficient to justify the stop, the Court said, except that further investigation by police officers provided corroboration of the details in the tip, including the place and approximate time of departure of the suspect, a description of her vehicle and her destination. 496 U.S. at 331. "Thus, it is not unreasonable to conclude in this case that the independent corroboration by the police of significant aspects of the informer's predictions imparted some degree of reliability to the other allegations made by the caller," the Court concluded. *Id.* The Court also found it important that the tip contained details that related not just to facts and conditions existing at the time of the tip which any observer could have noted – such as the description of a car parked outside the suspect's building – but to future actions of third parties that were not easily predicted:

> What was important was the caller's ability to predict respondent's future behavior, because it demonstrated inside information -- a special familiarity with respondent's affairs. The general public would have had no way of knowing that respondent would shortly leave the building, get in the described car, and drive the most direct route to Dobey's Motel. Because only a small number of people are generally privy to an individual's itinerary, it is reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual's illegal activities. When

> significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop.

Alabama v. White, 496 U.S. at 332 [citations omitted].[3] For the majority in *White*, this degree of specificity was sufficient. The dissent, in an opinion written by Justice Stevens, contended that more was required:

> Anybody with enough knowledge about a given person to make her the target of a prank, or to harbor a grudge against her, will certainly be able to formulate a tip about her like the one predicting Vanessa White's excursion.

496 U.S. at 333 (Stevens, J., dissenting). Thus, the members of the Court diverged in *White* over the quantum of specificity required to substantiate an anonymous tip leading to a *Terry* stop, not on the necessity for substantiation. The stop in the instant case involved no substantiation whatsoever, and consequently the standard set forth in *Illinois v. Gates* and

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[3] The requirement for corroboration of criminal information has always been foundational to American criminal jurisprudence. *Cf., Spinelli v. United States*, 394 U.S. 410 (1969) (corroboration existed) and *Illinois v. Gates*, 462 U.S. 213 (1983) (extrinsic evidence based upon totality of circumstances) with *Aguilar v. Texas*, 378 U.S. 108 (1964) (corroboration lacking) and *Wong Sun v. United States*, 371 U.S. 471, 488-489 (1963) (extrinsic corroboration lacking). In fact, this mandate hearkens back to the Magna Carta. McKechnie, *MAGNA CARTA*; A COMMENTARY ON THE GREAT CHARTER OF KING JOHN., pp. 370-377; 3 Rotunda, Treatise on Constitutional Law (Vol. 3) § 23.20.

Alabama v. White requires affirmance of the Florida Supreme Court's decision.[4]

It is certainly true that "the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct." *Terry*, 392 U.S. at 12 (quoting *Mapp v. Ohio*, 367 U.S. 643, 655 (1961)). On the other hand, "Regardless of how effective the [exclusionary] rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal." 392 U.S. at 14. The circumstances before the Court

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[4] *Cf. United States v. Walker*, 7 F.3d 26 (2nd Cir. 1993):

> Any mischievous member of the public could observe a distinctive-looking or distinctively-dressed person purchase a train ticket or board a train and could telephone a description and an accusation ahead to authorities at the train's destination. I believe that some indicium of reliability other than merely an accurate description of an individual's physique and whereabouts, which any observant stranger could provide, should be required before the individual may be stopped and detained.

Id. at 31 (Kearse, C.J., dissenting) [citations omitted]. *See also United States v. Deberry*, 76 F.3d 884, 886 (7th Cir. 1996) (Posner, C.J.)("to deem the [anonymous] tip adequately corroborated by circumstances that ... show nothing more than that the tipster had seen the person he was reporting would be mere bootstrapping, for the tipster could easily be a prankster who seeing a perfectly innocent-looking person in the street calls up the police and describes the location and appearance of the person.")

raise the spectre of such a regime, in which bullying tactics would take the place of proper investigation as the principle means of crime control. As Justice Stevens cautioned in his dissent in *Alabama v. White*:

> [U]nder the Court's holding, every citizen is subject to being seized and questioned by any officer who is prepared to testify that the warrantless stop was based on an anonymous tip predicting whatever conduct the officer just observed. Fortunately, the vast majority of those in our law enforcement community would not adopt such a practice. But the Fourth Amendment was intended to protect the citizen from the overzealous and unscrupulous officer as well as from those who are conscientious and truthful. This decision makes a mockery of that protection.

496 U.S. at 333 (Stevens, J., dissenting). The hazards to the integrity of law enforcement expressed by Justice Stevens in *White* would be heightened many fold in the instant case if the Petitioner and law enforcement agencies like it throughout the country are supplied the power to stop and frisk individuals on the street merely by alleging an anonymous report of weapons possession.

The dangers of such a regime are obvious:

> The right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court .... There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.

Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting). Diligence is necessary, the Court has warned, to ensure that the "very large category of presumably innocent" citizens who wish not to speak with police officers are not subject to "virtually random seizures." *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (a variety of circumstances which fell under the "drug courier profile" held insufficient to permit a stop because they encompassed a very large category of innocent travelers). One example of such a case is *Brown v. Texas*, 443 U.S. 47 (1979), in which the defendant was observed in a high-crime area, stopped and patted down absent reasonable suspicion that he was armed or engaged in criminal activity. Ordinarily, the individual would have gone on his way, intimidated and humiliated but unable to obtain redress for this deprivation of his constitutional liberties because the actions of the officer were not susceptible to proof that they were "shocking to the conscience" as amounting to a "deliberate indifference to" or "reckless disregard for" the subject's personal liberty. *Sacramento v. Lewis*, 523 U.S. 833 (1998). It was only because he was arrested and charged for refusing to provide his name that his case came to light, a practice the Court held violative of his right to decline to cooperate. 443 U.S. at 53. If the practice advanced by the Petitioner is declared constitutional by this Court, an untold number of innocent citizens may become victims of legal, systematized harassment by authorities. The delicate balance of individual liberty and the orderly administration of justice sought by the Framers of the Bill of Rights and the members of this Court may not survive the consequences of such a regime.

IV. CONCLUSION

It is true that the "often competitive enterprise of ferreting out crime" requires that police have the authority to thoroughly investigate criminal activity and to disarm dangerous citizens. *Terry*, 392 U.S. at 12, quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948). Nonetheless, it is equally true that the Supreme Court has "repeatedly decided that [the Fourth Amendment] should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers." *Gouled v. United States*, 255 U.S. 303, 304 (1921). *Amicus* The Rutherford Institute suggests that in this case, Florida seeks to allow its zeal for law enforcement outstrip its judgment. The decision of the Supreme Court of Florida should accordingly be affirmed.

Respectfully submitted,

John W. Whitehead
Steven H. Aden
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, Virginia 22901
(804) 978-3888